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The Courts, Not the Arbitrator, Must Decide Class Arbitrability Unless Clearly and Unmistakably Granted in the Arbitration Agreement: A Comment on 20/20 Communs., INC. V. Crawford

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THE COURTS, NOT THE ARBITRATOR, MUST DECIDE CLASS ARBITRABILITY UNLESS CLEARLY AND UNMISTAKABLY GRANTED IN THE ARBITRATION AGREEMENT: A COMMENT ON *20/20 COMMUNS., INC. V. CRAWFORD*

By
Andrew Peretin*

I. INTRODUCTION

The United States Court of Appeals for the Fifth Circuit recently determined that a court, not an arbitrator, needs to decide the gateway issue of class arbitration unless the arbitration agreement clearly and unmistakably grants this authority to the arbitrator.[1] The court determined that class arbitration is considered a gateway issue, which is a threshold question of arbitrability because class arbitration fundamentally differs from individual arbitration.[2] In *20/20 Communs., Inc. v. Crawford*, there was a general delegation clause giving the arbitrator the power to decide arbitrability issues and the arbitration agreement incorporated the American Arbitration Association ("AAA") rules providing that an arbitrator has the power to determine class arbitrability.[3] However, because a clause that appeared to generally prohibit class arbitration existed in the arbitration agreement, it was determined that the courts, not the arbitrator had the power to determine whether class arbitrability could proceed.[4] This ruling overturned the district court decision in *20/20 Communs., Inc. v. Blevins*, which held that the arbitrator had been granted the power to decide the gateway issue of class arbitration.[5]

II. CASE BACKGROUND

20/20 Communications, Inc. ("20/20") is a national company that primarily focuses on direct-sales and marketing.[6] 20/20 employs field sales managers.[7] The field sales managers are required to sign a "Mutual Arbitration Agreement" ("MAA") upon employment.[8] The MAA was

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[1] 20/20 Communs., Inc. v. Crawford, 930 F.3d 715, 721 (5th Cir. 2019).

[2] *Id.* at 718-19.

[3] *Id.* at 575.

[4] *Id.* at 721.

[5] 20/20 Communs., Inc. v. Blevins, 357 F. Supp.3d 566, 570 (N.D. Tex. 2019).

[6] *Crawford* at 717.

[7] *Blevins* at 570.

[8] *Id.* (citing Mutual Arbitration Agreement).

meant to be the sole agreement between 20/20 Communications and its employees for dispute resolution.[9]

The MAA stipulated that the parties would submit any and all disputes and claims to arbitration.[10] The agreement covered almost all claims, including: wages, overtime, benefits or other compensation, and breach of any express or implied contracts.[11] Under the terms of the agreement, the Federal Arbitration Act and Texas law governed enforcement of the agreement and its ability to compel arbitration.[12] The MAA further stated that the arbitrator is limited to use of the MAA and controlling law for determining disputed maters.[13] In the process, the arbitrator should apply the American Arbitration Association's ("AAA") National Rules for the Resolution of Employment Disputes unless the rules conflict with the contract.[14]

The agreement stated that the arbitrator has the ability to resolve the arbitrability issues if the parties disagree over the MAA's formation or meaning.[15] Last, and of most significance to the Fifth Circuit, the arbitration agreement stated:

> [T]he parties agree that this Agreement prohibits the arbitrator from consolidating the claims of others into one proceeding to the maximum extent permitted by law. This means that the arbitrator will hear only individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law . . . Employer may use this Agreement to defeat any attempt by Employee to file or join other employees in a class, collective, or join action lawsuit or arbitration, but the Employer shall not retaliate against Employee for any such attempt.[16]

The purpose of the clause above was for 20/20 to expressly prohibit class arbitration and to prohibit the arbitrator from even having the authority to consolidate claims into a class. This demonstrates the party's clear intent not to allow class arbitration to the extent that the laws allow this.

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[9] *Blevins* at 570.

[10] *Id.* (citing MAA) (stating "Employee and Employer . . . both agree that all disputes and claims between them, including those related to Employee's employment with Employer and any separation therefrom . . . shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator . . . and that judgment upon the arbitrator's award may be entered in any court of competent jurisdiction . . . Employer and Employee voluntarily waive all rights to trial in court before a judge or just on all claims between them.")

[11] *Id.* at 571 *(*additionally the MAA claims covered discrimination, harassment, retaliation, violation of public policy, personal injury, and tort claims including defamation, fraud, and emotional distress).

[12] *Id.* (citing 9 U.S.C. § 1 et. seq.).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* (citing the MAA).

From April 11, 2016 until May 13, 2016, eighteen field sales managers filed individually for arbitration.[17] The individual claims stated that 20/20 failed to pay overtime compensation in violation of the Fair Labor Standards Act ("FLSA").[18] Each individual employee demanded an arbitrator "with knowledge of employment law, specifically the FLSA, collective action under the FLSA and the National Labor Relations Act" to preside.[19]

On August 5, 2016, 20/20 contended that one of the defendants amended their claim to assert a class action for arbitration after an initial case-management conference.[20] In response, 20/20 filed a suit (*Blevins*) seeking declaratory judgment on whether the court, not the arbitrator, should decide whether arbitration was available under the MAA; and whether class action was available in this case.[21]

While the district court proceedings were pending, some employees requested that the arbitrators issue a statement that a class arbitration bar is prohibited under the National Labor Relations Act. ("NLRA")[22] Of the eighteen cases of arbitration filed, six arbitrators issued awards, and of importance, one stated that the class arbitration bar was unenforceable under the NLRA.[23] 20/20 filed a separate action (*Crawford*) in federal court to vacate the class arbitration bar under the NLRA.[24] The district court rejected the request and confirmed the award in *Crawford*.[25] Additionally, the district court in the first case *Blevins*, held that the arbitration agreement authorized the arbitrator, not the courts, to determine class arbitrability.[26] The Fifth Circuit consolidated *Blevins* and *Crawford* for the purpose of appeal and decided that courts, not judges, determine the gateway issue of class arbitration in the absence of clear and unmistakable language granting the question to an arbitrator.[27]

III. THE DISTRICT COURT PROCEEDINGS OF BLEVINS

[17] *Blevins* at 571.

[18] *Id.* (citing 29 U.S.C. § 201 et. seq.).

[19] *Id.* (citing Defs.' App. To Mot. To Dismiss (doc. 69) 21-38).

[20] *Id.*

[21] *Id.* at 572. *See*. *Blevins*.

[22] *Crawford* at 717.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 718.

[26] *Id.*

[27] *Id.* at 718, 715.

In *Blevins*, the district court began its analysis by stating that Section 2 of the FAA governed.[28] The court then stated that there is a strong federal policy in favor of arbitration and that "ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration."[29].

The court summarized the arguments of both parties then examined the delegation-clause issue that it determined was key in the dispute.[30] The court defined a delegation clause as "an agreement to arbitrate threshold issues concerning the arbitration agreement."[31] For delegation clause questions, the court performs a two part analysis that begins by asking whether the parties entered into any arbitration agreement at all.[32] Then the court determines whether the agreement had a delegation clause.[33]

In this case, the parties did not contest whether they entered into a valid arbitration agreement, so the court only needed to determine whether the MAA had a delegation clause.[34] The court found that the MAA had a delegation clause.[35] The court's analysis then was focused on whether the question of arbitrability fit within the delegation clause's language.[36] The court rephrased this and asked whether the delegation clause covered class arbitration, which is a gateway issue.[37] Gateway issues are disputes that a court has the power to determine.[38] Courts have this ability unless the parties clearly and unmistakably state that the arbitrator should determine the issue.[39] In this case, the court held that the MAA met this clear and unmistakable standard and that the arbitrator should decide on the issue of whether the arbitration agreement

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[28] *Blevins* at 573

[29] *Id.* (citing *Mastrobuno v. Shearson Lehnam Hulton, Inc.*, 514 U.S. 52, 62 (1996) (quoting *Volt Info Sci., Inc. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989).

[30] *Id.* at 575.

[31] *Id.* (citing *Rent-A-Ctr., W., Inc, v. Jackson*, 561 U.S. 63, 68 (2010)).

[32] *Id.* (citing *Kubala v. Supreme Prod. Sers.*, 830 F.3d 199, 201 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995))).

[33] *Id.* (citing *Kubala* at 201 (citing Kaplan at 942)).

[34] *Id.* at 576.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (citing *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83-83 (2002)).

would allow arbitration.[40] The court came to this conclusion based on the following three main reasons.[41]

First, the court analyzed the plain meaning of the contract.[42] The court noted that its objective was to determine the party's intentions and to enforce the intentions as written when unambiguous.[43] The court determined that the language of the delegation clause was unambiguous and it allowed for the arbitrator to determine disagreements related to the MAA's formation or meaning.[44] The court determined that the issue of whether a party may arbitrate as a class clearly concerns the MAA's meaning and thus was reserved explicitly for the arbitrator to decide. [45] The court then cited the Supreme Court's interpretation of similar contractual language in *Rent-A-Center*.[46] In *Rent-A-Center,* the following clause was considered a delegation clause: "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, [or] enforceability . . . of this Agreement."[47] The district court believed that the MAA's language is similar to the delegation clause in *Rent-A-Center,* and that it gives the arbitrator the power to determine arbitrability issues.[48] The district court determined that the court thus lacked the subject-matter jurisdiction to decide this issue.[49]

Second, the court found that incorporating the rules of the AAA provided additional support for the interpretation that the arbitrator should decide the issue of class arbitrability.[50] After the Supreme Court decided *Green Tree Fin. Corp. v. Bazzle*., the AAA arbitration rules, including the specific action and separate Supplementary Rules for Class Action were enacted.[51] Part of the AAA Employment Rules state that the arbitrator will apply the AAA rules if there is a material

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[40] *Blevins* at 576

[41] *Id.*

[42] *Id.*

[43] *Id.* (citing *Reliant Energy Servs., Inc. v. Enron Can. Corp.*, 349 F.3d 816, 822 (5th Cir. 2003)).

[44] *Id.*

[45] *Id.* (Black Law Dictionary 10th ed. 2014 defines a contract's "meaning" as "that which is conveyed or intended to be conveyed by a written or oral statement or other communicative act.").

[46] *Id.* (citing *Rent-A-Ctr.* at 68).

[47] *Id.* at 577 (citing *Rent-A-Ctr.* at 66)

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)) (Bazzle involved contracts for a commercial lending company, that included arbitration agreements. The agreement stated that the parties agreed to submit all disputes, claims, or controversy relating to or arising from the contract to the arbitrator. The court held, in a plurality opinion, that an arbitrator must decide whether the contracts forbid class arbitration).

inconsistency with the rules and the arbitration agreement.[52] Further, Supplementary Rule 3 contains the "Clause Construction Award" which lets the arbitrator decide whether to permit class arbitration based on the arbitration clause.[53]

The court then cited the following Fifth Circuit cases that addressed incorporating the AAA rules as evidence that the parties agreed to arbitrate arbitrability.[54] In *Petrofac. Inc. v. DynMcDermott Petroleum Operations Co*., the court held that adopting the AAA rules was clear and convincing evidence that the parties decided to arbitrate arbitrability.[55] Additionally, in *Reed v. Florida Metropolitan University*, the Fifth Circuit held that the district court properly decided that the arbitrator should decide class-arbitration in this case because "the parties here consented to the Supplementary Rules, and therefore agreed to submit the class arbitration issue to the arbitrator."[56] The court thus decided to expressly decline 20/20's proposition that the MAA's preclusion to class arbitration overrides the Supplementary Rules of the AAA that was incorporated.[57]

Third, the court found that the arbitration agreement's broad language in favor of disputes being resolved through arbitration deprived the court of its ability to determine if class arbitration was allowed.[58] The MAA stated that "all disputes and claims . . . shall be determined exclusively by final and binding arbitration . . . ."[59] The Fifth Circuit, in *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas*, held that if an arbitration agreement that is disputed has broad language, including a contract clause that submits all disputes or claims arising or relating to the agreement to arbitrate, then class arbitration should be determined by the arbitrator."[60] The court stated that although the language in *Pedcor* is more narrow, the reasoning still held.[61]

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[52] *Blevins* at 577 (citing AAA Employment Arbitration Rules and Mediation Procedures, R. 1 (Eff. Nov. 11, 2009)).

[53] *Id.* at 578. (citing the Supplementary Rules for Class Arbitrations at 3-4).

[54] *Id.*

[55] *Id.* (citing *Petrofac. Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012)).

[56] *Id.* (quoting *Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 634 n.3 (5th Cir. 2012) (This case was abrogated on other grounds by Oxford health Plans LLC v. Sutter, 569 U.S. 564 (3013)).

[57] *Id.*

[58] *Id.*

[59] *Id.* (citing the MAA).

[60] *Id.* at 579 (citing *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas*, 817 F.3d 193, 196 (5th Cir. 2016). (the case involved the Fifth Circuit analyzing an arbitration agreement with broad delegation language and determining whether the arbitrator should decide the issue of class arbitration).

[61] *Id*. *see also Gonzales v. Brand Energy & Infrastructure Servs., Inc.*, No. H-12-1718, 2013 U.S. Dist. LEXIS 396335 at *5 (S.D. Tex. Mar. 20, 2013) ("holding that a class arbitrability question was to be resolved by an arbitrator due, in part, to an arbitration agreement's inclusion of broad language").

Finally, the court disagreed with 20/20 and did not believe *Epic Systems* governs this issue.[62] In *Epic Systems*, the Supreme Court held that an arbitration agreement that required individual arbitration, rather than allowed class actions, was enforceable under the FAA.[63] 20/20 argued that *Epic Systems* created a rule that arbitration agreements that have a class-action waiver override provisions that could delegate questions of class-action to the arbitrator.[64] The court did not agree.[65] The court believed that *Epic Systems* only recognized the enforceability of class-action waivers, but did not decide the question of who should resolve the arbitrability of class claims.[66] The court also stated that the arbitrator may decide whether *Epic Systems* resolves the current issue.[67] In conclusion, the court decided that whether the defendant should be able to proceed as a class is a decision for an arbitrator and not the court.[68]

IV. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S ANALYSIS

In *Crawford*, at the district level, the court rejected 20/20's action to vacate the class arbitration bar declared by an arbitrator.[69] 20/20 appealed and the Fifth Circuit took the case.[70] After hearing oral arguments, the district court in *Blevin* held that the arbitrator and not the courts determined class arbitrability.[71] The Fifth Circuit joined both cases for appeal.[72]

The Fifth Circuit describes the two principle questions as whether class arbitration is a gateway issue which the courts should decide, and whether this arbitration agreement had clear and unmistakable language that the arbitrator should decide instead of the court.[73] The Fifth Circuit noted that the Supreme Court has not decided if class arbitrability is a gateway issue.[74] The Fifth Circuit recognized that it has not yet addressed this issue.[75]

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[62] *Blevins* at 578 (citing *Epic Sys., Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018)).

[63] *Id.* (citing *Epic Sys.* at 1632).

[64] *Id.* (citing Pl.'s Resp. to Defs.' Mot. To Dismiss 28.).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Crawford* at 718.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.; See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 n.4 (2019).

[75] *Id.*

The Fifth Circuit then noted that other circuit courts have all decided that class arbitrability is a gateway issue.[76] The Fifth Circuit sided with the sister circuits and held that class arbitrability is a gateway issue that a court and not an arbitrator should decide unless there is clear and unmistakable language granting the authority to the arbitrator.[77] The Fifth Circuit reasoned that class and individual arbitration differ in fundamental ways.[78]

The Supreme Court has previously expressed the difference in form, that "[t]he class action is an exception to the usual rule that litigation is conducted by, and on behalf of, the individual named parties only."[79] The Fifth Circuit then asserted that there are significant practical and substantive consequences of class arbitration.[80] The Fifth Circuit stated that class arbitration adds to not only the size, but also the complexity of arbitration.[81] Additionally, due process concerns arise.[82] As *AT&T Mobility* mentioned, the absent parties must "be afforded notice, an opportunity to be heard, and a right to opt out of the class."[83] This has the potential to increase the cost and compromise efficiency.[84] The Fifth Circuit also recognized that privacy and confidentiality are key aspects of arbitration.[85] Class arbitration could thus threaten parties' perceived assumption of privacy and confidentiality.[86]

After determining that class arbitration is a gateway issue, the Fifth Circuit then turned to the question of whether the parties clearly and unmistakably agreed to have the arbitrator determine the issue.[87] The Fifth Circuit quoted the following language from the MAA to demonstrate the party's intent to preclude class arbitration:

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[76] *Crawford* at 718. *See Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013); *Herrington v. WaterstoneMortg. Corp.*, 907 F.3d 502, 506-07 (7th Cir. 2018*); Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Eshagh v. Termnix Int'l Co., L.P.*, 588 F. App'x 703, 704 (9th Cir. 2014) (unpublished); *JPay, Inc. v. Kobel*, 904 F.3d 923, 935-36 (11th Cir. 2018).

[77] *Id.* Contra. *JPay* at 923; *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 27 (2d Cir. 2019) (concluding that a delegation clause is enough to give the arbitrator the power to decide class arbitrability).

[78] *Id.* at 719.

[79] *Id.* (citing *Wal-Mart Stores. Inc. v. Dukes*, 564 U.S. 338, 348 (2011) quoting (*Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979))).

[80] *Id.*

[81] *Id.* See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (stating class arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment").

[82] *Id.* See, e.g., *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013*); Catamaran Corp. v. Towncrest Pharm.*, 864 F.3d 966, 972 (8th Cir. 2017).

[83] *Id.* (citing *AT&T Mobility* at 349).

[84] *Id. See*, e.g., *Catamaran* at 972.

[85] *Id.*

[86] *Id. see Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010); *Catamaran* at 971-72.

[87] *Id.*

> [t]he parties agree that this Agreement prohibits the arbitrator from consolidating the claims of others into one proceeding, to the maximum extent permitted by law. This means that an arbitrator will hear only individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law.[88]

The Fifth Circuit concluded that this clause precluded class arbitration to the maximum extent of law and clearly demonstrated the party's intent to disallow class arbitration.[89] The Fifth Circuit found that categorically prohibiting class arbitration, and then vesting the arbitrator the authority to decide on class arbitration, was illogical.[90] The Fifth Circuit held that there was not clear and unmistakable language which is required to give the arbitrator the authority to decide on class arbitration.[91]

The Fifth Circuit recognized the three provisions cited by the employees.[92] These included: the disagreement over issues of formation being decided by arbitrator; the incorporation of the AAA rules, which explicitly state that when the rules are inconsistent with the agreement, the agreement governs; and the clause that all disputes are determined exclusively by final and binding arbitration, noting that the clause begins with the phrase "except as provided below."[93]

The Fifth Circuit recognized that those provisions, separated from the class arbitration bar, could be construed as granting the arbitrator the power to decide the issue of class arbitration.[94] The Fifth Circuit also recognized *Robinson*, which stated that broad coverage language similar to the language in the provision, gives the arbitrator the power to decide the availability of class arbitration.[95] The Fifth Circuit then stated that examining whether the three clauses on their own is enough to decide the question of arbitrability is not necessary.[96] The Fifth Circuit decided that when the three provisions cited by the employees were compared with the class arbitration bar, none of the provisions contained the clear and unmistakable language necessary for the arbitrator to decide the issue of class arbitration.[97]

The Fifth Circuit noted that two of the provisions have expressed exceptions that negate the provisions if they contradict with any other provision in the arbitration agreement, which the

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[88] *Crawford* at 720 (citing the MAA).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* (citing the MAA).

[94] *Id.*

[95] *Id.* (citing Robinson at 196).

[96] *Id.* at 721.

[97] *Id.*

court found they clearly do.[98] Additionally, the Fifth Circuit does not think the exception clauses have the specificity required.[99] In contrast, the class arbitration bar specifically prohibits class arbitration disputes.[100]

In conclusion, because the provisions do not clearly and unmistakably give the arbitrator the authority to decide class arbitrability, courts, not arbitrators, are required to decide the issue of class arbitration.[101]

V. SIGNIFICANCE

The major significance from *2020 Communs., Inc. v. Crawford* case is that a class bar overcomes general delegation clauses and incorporation of the AAA's rules and gives the courts, not the arbitrator, the power to decide class arbitrability. Significantly, the Fifth Circuit did not address whether the general delegation clause and incorporation of the AAA's rules can give the arbitrator the power to decide class arbitration when no class bar exists.[102] In order to draft an arbitration clause that allows an arbitrator to decide class arbitrability, general delegation clauses and AAA rules do not meet the standard of clear and unmistakable. Including a clause that states class arbitrability is delegated to the arbitrator as part of a delegation clause could help prevent this dispute in the future.

VI. CRITIQUE

The major critique in this case is that the plain language of the MAA appears to delegate the authority to resolve arbitrability questions to the arbitrator.[103] In this case, the agreement contains a delegation clause, incorporates the AAA's rules, and requires the parties to arbitrate all disputes.[104] 20/20 argues that the class waiver is controlling and shows clear intent to preclude class arbitration.[105] However, the issue presented on appeal appeared to be whom parties delegated resolution of the issue of class arbitration to, not whether class arbitration is

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[98] *Crawford* at 721.

[99] *Id.*

[100] *Id.* See, e.g., *Baton Rouge Oil and Chem. Works Union v. ExxonMobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002) ("It is a fundamental axion of contract interpretation that specific provisions control general provisions.") (citing Restatement (Second) of Contracts § 203(c) ("specific terms and exact terms are given greater weight than general language")).

[101] *Id.*

[102] *Crawford* at 721.

[103] Brief of Appellees at 15, 20/20 Communs., Inc. v. Crawford, 930 F.3d 715, 721 (5th Cir. 2019) (Nos. 19-10050, 18-10260), 2019 WL 1559393.

[104] *Id.* at 16.

[105] *Id.*

allowed.[106] Because of this, the issue of arbitrability should actually preclude the issue of whether class action is allowed.[107] Even if there is a clear class action waiver, class arbitrability is still an issue that needs to be resolved separately and first.[108]

Additionally, the Fifth Circuit has previously held that incorporating the American Arbitration Association rules is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.[109] This combined with a delegation clause that gives the arbitrator the power to decide questions of arbitrability seem to indicate that an arbitrator should decide the issue. Even if a class bar is included, this clause should be interpreted by the arbitrator and the arbitrator should decide whether this bar should apply.

VII. CONCLUSION

The Fifth Circuit declared that courts, not arbitrators, will decide the gateway issue of whether class arbitration is available unless there is a clear and unmistakable language that the arbitrator was granted this power.[110] Additionally, general delegation clauses and incorporating the AAA rules is not enough to grant this power to the arbitrators when a class arbitration bar exists.[111]

The Fifth Circuit does not address whether granting an arbitrator power to resolve arbitrability issues and incorporating the AAA rules, absent a class bar, grants an arbitrator the power to decide on class arbitration.[112] The Fifth Circuit recognizes that the above provisions could potentially grant an arbitrator the ability to decide gateway issues such as whether class action is available.[113]

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[106] Brief of Appellees at 16, 20/20 Communs., Inc. v. Crawford, 930 F.3d 715, 721 (5th Cir. 2019) (Nos. 19-10050, 18-10260), 2019 WL 1559393.

[107] *Id.*

[108] *Id.* at 29-30 *(*citing *Pedcor* at 360) (stating "[Even] if the arbitration provision clearly did forbid class arbitration, then the arbitrator could – and [] should – make this call without any prior analysis by a court.").

[109] See, e.g. *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 553 (5th Cir. 2018); *Petrofac* at 675 (both cases holding that incorporating the AAA rules showed the parties had clearly and unmistakably agreed to arbitrate arbitrability).

[110] *Crawford* at 721.

[111] *Id.* at 720.

[112] *Id.*

[113] *Id.*